

~~adventurous expedition to those unsafe regions of terra incognita (it was alleged). It could neither refuse to deliver judgment and deny justice. Tactfully it suggested a Compromise.~~

~~It was reported afterwards that plaintiff was given a lease hold by the Housing Department instead of the requisitioned building and appeal was abandoned. The dictates of justice were hardly satisfied in this case. But what is more disquieting is the complete failure of the courts to develop a sound system of judicial review which is by now, long overdue.~~

THE MEANING OF THE 1971 PARIS CONVENTIONS ON COPYRIGHT*

J. A. MICALLEF

MANY complex problems in the field of International Copyright arise because the matter is governed by two different conventions. While most of the European States continued to adhere to the International Conventions signed in Berne in the 19th Century, the United Nations had signed soon after World War II another international instrument known as the Universal Copyright Convention. An attempt has now been made in Paris to bring into closer association these two international agreements and setting up of an international centre as a link between publishing houses and the developing countries.

It was no doubt a unique occasion to observe delegates from so many different countries attending simultaneously two international conventions, and make it clear that they had come to U.N.E.S.C.O. House at Place de Fentenoy, Paris, with the spirit and zeal to revise two conventions simultaneously, albeit in separate gatherings, and to create greater harmony and co-operation between them.

*The Original copy of this Article was sent to Dr. Arpad Bogsch, Deputy Director of the World Intellectual Property Organization who deposited it at the Library of W.I.P.O. at Geneva. A Memo-Study was sent to the Maltese Ministry of Trade and Industry after the Paris Conferences and the matter was the subject of a Public Lecture given under the auspices of the Law Society at the Aula Magna, on April 25, 1972.

Much had been achieved when twenty six countries signed the Paris Acts on the morning of July 24, 1971. Although among the signatories one met the representatives of such small states as Liechtenstein, Monaco and the Holy See, unfortunately Malta did not sign the Acts.

The revision of the Berne Convention was closely linked with the conference on the Universal Copyright Convention. The latter had originally been signed in Geneva in 1952 and had never been revised. Among its signatories were a number of developing countries who had felt that the rules of the Berne Convention were too rigid. It was for the purpose of liberalising these principles that the Berne Convention has now been revised in Paris.

The Director General of the World Intellectual Property Organisation (W.I.P.O.) convened a Diplomatic Conference in search of a general system of international copyright protection that was acceptable to many nations.

The aim of the meeting was asserted by the Director General of W.I.P.O. Professor G.H.C. Bodenhausen, at his opening address on July 5, 1971, when he declared that the delegates were meeting to enable the developing countries to choose a solution fitted to their needs, while, at the same time, acceptable to the countries which are the largest producers of literary, scientific and artistic works.

The two Conferences that took place in Paris were a consequence of some of the principles adopted in the last revision of the Berne Convention held in Stockholm in 1967. The Stockholm Act of the Berne Convention tried to establish a system aimed at meeting certain needs of the developing countries in the fields of culture and education. The system, however, was not readily accepted by a large number of States and many had not ratified it. It became clear that the matter required further review and very detailed preparatory work to provide new solutions were taken in hand by the Secretariat at W.I.P.O.

The task of revising the Berne Convention in Paris, was undertaken by two bodies: the Main Commission and the Drafting Committee. Professor Eugen Ulmer of the Federal Republic of Germany was elected Chairman of the Main Commission. His nomination was proposed by the Delegation of India and supported by the Delegations of the Netherlands, Canada, Italy and France. The Drafting Committee was chaired by Mr. William Wallace of the United Kingdom.

It has been observed that the Paris Acts had been necessitated by the work carried out in Stockholm in 1967 and the recognition of the importance of the Stockholm Convention is now asserted by a declaration in the Preamble which has been re-drafted in such a manner that it no longer makes reference to the previous conferences held in Berlin, Rome and Brussels but underlines only the work done at Stockholm.

A number of general substantive provisions (Articles 1 to 20) of the previous Berne Conventions and the administrative provisions (Articles 22 and 26) have not been altered. Some of these rules had been incorporated in the Stockholm Act, and this, in itself, proved that the Stockholm Conference had achieved some measure of success even among the developing countries.

The Stockholm Convention had already liberalised a number of rules and set up the World Intellectual Property Organization. But some of these rules were not regarded as satisfying the demands and requirements of the developing countries. The Protocol regarding the Developing Countries has now been repealed and submitted by a detailed Appendix which has been liberally inspired in favour of the latter countries.

The Berne Convention has now been revised in Paris in such a manner that matters have been simplified for members of U.C.C. One very important point is that if a member does not give full protection for the life of the author and fifty years after his death as provided in Article 7 of the Berne Convention, such member may now ratify the Paris Convention in part¹ and therefore may, while not acceding to the substantive provisions including the important one relating to the term of copyright, yet adhere in part to the Paris Convention. Subject to a number of exceptions, some of which are quite important, ratification or accession shall automatically entail acceptance of all the provisions and admission to all the advantages of the Convention.² These exceptions, again have been introduced to enable the Developing Countries to accede to the new Paris Act. The previous Acts of the Berne Convention shall continue to be applicable in relations with countries of the Union which do not ratify the new Convention.

Therefore, until Malta has ratified the Paris Act, we shall continue to be governed by the previous convention which in the case

¹Article 28 (1b) of the Paris Act of the Berne Convention.

²Article 30 Idem.

of Malta is the Rome convention of 1928 and to which we are still bound. Once a country has acceded or ratified the first part of the Convention and the Appendix, it may not then accede to earlier acts.³ A country may also, finally denounce the Paris Act but this may not take place before the expiration of 5 years from the date upon which it became a member. In case of dispute between two or more countries of the Union concerning the interpretation of the Convention the matter, may, by any one of the countries concerned be brought before the International Court of Justice.

Most of the facilities laid down in the Paris Acts were included for the first time in the Stockholm Convention of 1967 but they have now been altered to meet other requirements of the developing countries. These facilities now no longer form the basis of a Protocol regarding Developing Countries but have been grouped in an Appendix which forms an integral part of the Convention itself.

The Berne Convention recognizes to Authors the exclusive right of making and of authorizing the translation of their works throughout the term of protection laid by the convention. This is not to be less than the duration of the life of the author and fifty years after his death. The Paris Act now modifies this exclusively by authorizing Developing Countries for the purpose of teaching, scholarship or research⁴ to substitute such a right by a system of non-exclusive and non-transferable licenses.

A preferential treatment will now be given to those countries which in accordance with the established practice of the General Assembly of the United Nations are regarded as developing countries and which having regard to their economic situation and their social or cultural needs, do not consider themselves immediately in a position to make provision for the protection of all the rights mentioned under the Convention.

No doubt big problems face those nations with a very large number of languages, such as in the case of India, of which only a few are in general use. Indeed in an attempt to improve educational standards in such countries, the Convention has, through a system of licence, restricted the Author's rights of Translation and of Reproduction.

TRANSLATIONS

In examining the facilities of translating works one must ob-

³ Article 34 Idem.

⁴ Appendix (Article II (5)) Berne Convention op.cit.

serve that the provisions of Articles II and III of the Appendix of Paris Act have laid down a number of conditions⁵ among which the more important are the following:

A licence to translate shall be granted only for the purpose of teaching, scholarship or research⁶ and may be acquired by any 'national of the country', which term the conference meant to include legal entities, local authorities and enterprises owned by the state.⁷ A licence may also be granted if all editions of the translations published in the language concerned are out of print. The application for a licence is to be made in accordance with the procedure laid down by the particular country.

Licence rights shall be granted after the lapse of a certain term which has now been shortened considerably by the Paris Acts and is dependent on the kind of language in use. The period is of three years, or any longer period determined by the national legislation of the country, when a translation has not been published in a language in general use in the country, such would be a translation of a work in Malta in the English language. In the case of a translation into a language which is not in general use in a developed country which is also a member of the Berne Convention, the period for application for a licence is further reduced to one year. In either case the period shall commence from the date of the first publication of the work. The three year period in case of a language in general use may be further reduced, to a shorter period of one year, by the unanimous agreement of all the developed countries in which the language is in general use. This rule shall, however, not apply where the language in question is English, French or Spanish.

After the lapse of the above terms, the owner of the right of

⁵ This refers to the Berne Convention. Very similar provisions were also introduced in the Paris Act of the Universal Copyright Convention.

⁶ M. Kaminstein in his General Report states that it was the understanding of the Conference that the word 'scholarship' refers not only to instructional activities at all levels in tutorial institutions, primary and secondary schools, colleges and universities, but also to a wide range of organized educational activities. The Conference also agreed that the word 'research' could not be interpreted as to permit the translation of copyright works by industrial research institutes or by private corporations doing research for commercial purposes. (Para 73, U.C.C. Report, 1971).

⁷ Vide Report of the Diplomatic Conference for the Revision of the Berne Convention dated 23rd July, 1971, Para. 29.

translation shall be allowed further periods of six or nine months as the case may be⁸ from the date of the request for authority to translate the work which has been submitted to the owner, or where his identity or address is unknown, copies thereof have been sent to the national or international body.⁹ During this further period the owner may himself publish a translation in the language in respect of which the application was made, thus giving the owner of the right of translation a further opportunity of making the translation himself.¹⁰

When a work consists mainly of illustrations, a licence to publish a translation may only be granted if the stricter conditions laid down in Article II of the Appendix to the Paris Convention are fulfilled.

Translation licences shall terminate as soon as a translation of the work is published in the same language by the owner, or by his authority, at a price reasonably related to prices for comparable works. Any outstanding copies made before the licence is terminated may continue to be distributed until their stock is exhausted. A licence to translate shall be refused when the Author has withdrawn from circulation all copies of his work.¹¹

Broadcasting Organizations. While authors of literary and artistic works continue to enjoy, under the revised Berne Convention the exclusive right of authorizing the broadcasting, or rebroadcasting of the work, or its communication to the public by loudspeaker,¹² translation licences may also be granted to any broadcasting organization which has its headquarters in a country making a declaration that it will avail itself of this facility.¹³

While, therefore, translation rights may be acquired by a broadcasting organization, the general rules of the convention remain unmodified.¹⁴ The exclusive rights which authors enjoy to authorize the broadcasting of a work shall be exercised under such terms and conditions which are laid down by the legislation of the Union country. The rules are not in any way to prejudice the moral rights

⁸ Appendix Article II (4) a. Berne Convention, op.cit.

⁹ Appendix Article IV (2) idem.

¹⁰ Appendix Article II 4b. Berne Convention op.cit. and Art. Vter 2(b) of the Paris Act of the Universal Copyright Convention (U.C.C.) 1971.

¹¹ Appendix Article II (6), (8), Berne Convention op.cit.

¹² Article II Bis idem.

¹³ Appendix Art. II (9) Berne Convention and Art. Vter (8) (U.C.C.) op.cit.

¹⁴ Vide Report para. 33. op.cit.

of the author or his right to obtain equitable remuneration. Although permission to record the work that has been broadcast shall not be implied, unless there is agreement to the contrary, national legislation may authorize the preservation of such recordings in official archives if they are of exceptional documentary character.

The Paris Acts now authorize the grant of a licence to make a translation of a work which has been published in printed or analogous forms of reproduction to any broadcasting organization provided it abides by certain conditions. The translation is to be made from a copy made and acquired in accordance with the laws of the country where the organization has its headquarters. The general report of the convention explains this.¹⁵ The copy from which the translation is made must not be an infringing copy according to the laws of that country and, any use of the translation is not to be made for commercial purposes but is intended for use in broadcasts exclusive for teaching or for the dissemination of the results of specialized research to experts in a particular profession.

The sound or visual recording of a translation which the broadcasting organization enjoying a translating licence makes, may by agreement be used by any other broadcasting organization provided it has its headquarters in the same country as the authority granting the licence. Finally, the broadcasting organization may also acquire a licence to translate any text incorporated in an audio-visual fixation where the fixation was prepared and published for the only purpose of its being used in connection with systematic instructional activities.

Reproduction of Works. The revised Berne Convention in Article IX again reasserts the exclusive right of authors to authorize the reproduction of their works in any form or manner. But the Act itself modifies this right and provides¹⁶ for a system of non-exclusive and non-transferable licences, very similar to that of translating licences, for use in connection with what the new convention describes as 'systematic instructional activities'.¹⁷

The reproduction licence shall be granted after a period of five years commencing on the date of first publication of a particular

¹⁵ Vide Report para. 34, op.cit.

¹⁶ Appendix Article II Berne Convention op.cit., and Article V/Quater (U.C.C.) op.cit.

¹⁷ Article V/Quater (U.C.C.) op.cit.

edition of the work, or any longer period determined by national legislation of the country,¹⁸ if copies of the edition have not been distributed in the country to the general public. A licence for reproduction will also be granted when copies of a work have not been distributed at a price reasonably related to that normally charged in the country for comparable works. In such a case, the work for the purpose of distributing it as a part of an instructional activity systematically carried out may be reproduced even at a lower price.

Exhausted Editions. The relevant time periods, before reproduction of the work is authorized, in case the work has been published in successive editions, are applicable to each edition. Besides when the relevant applicable periods have expired, a licence to reproduce and publish an edition will also be granted if no copies of that edition are on sale for a period of six months or in the case of systematic instructional activities if no copies at reasonable prices are available.

Audio-visual reproductions. The Paris Act of the Berne Convention¹⁹ extends these same rights to the reproduction of works even in audio-visual form. The original fixations containing both pictures and sound must, however, have been prepared and published for the sole purpose of being used in connection with systematic instructional activities. If the reproduction is made from a fixation that has been lawfully made, the conference, on the proposal of the delegation of the United Kingdom, accepted that a fixation prepared solely for use in curricular education could be licensed for reproduction.²⁰

Translations. A limitation on the reproduction of translation has been adopted.²¹ It precludes the granting of a licence to reproduce and publish a work that is itself a translation from another language unless it was published by the owner of the right of the translation or the translation is not in a language in general use in

¹⁸ This period is reduced to 3 years in the case of works of the natural and physical sciences and technology. It is altered to 7 years for works of fiction, poetry, drama and music and for art books.

¹⁹ Article III (7) (b) Berne Convention op.cit.

²⁰ Report of the Conference on the Universal Copyright Convention (Para. 110).

²¹ Appendix Article III (5) Berne Convention op.cit., and Article Vter 2 (b) (U.C.C.) op.cit.

the State having the power to grant the licence.²²

Finally, no licence for the reproduction of a work shall be granted if the author has withdrawn from circulation all copies of the edition of that particular work.

CONVENTION FACILITIES

While a view point was expressed at the conference that culture was a fundamental patrimonial right and a part of the general wealth making it a duty of the State to assure the material well-being of the intellectual worker,²³ the conferences have attempted to reconcile the interests of the one hand of those producing works and on the other of those developing countries who for economic reasons are unable to secure rights of publication. The conventions have worked out a compromise pattern. 'While providing better protection for the authors of intellectual works' uttered Monsieur Rene Maheu, the Director General of U.N.E.S.C.O. 'the conference invited proposal for facilitating the dissemination of such works by means of temporary relaxations for the benefit of developing countries'.²⁴

The conventions laid down the criteria for considering what is a *developing country*. Similar reckonings were adopted by the two conferences, although the Universal Copyright Convention did not adopt an operative phrase originally evolved at Stockholm. The Conferences did not draw up a list of such countries but considered such country as meaning 'any country regarded as a developing country in conformity with the established practice of the General Assembly of the United Nations'. The criteria on which the practice is based may vary from time to time and the development of a particular country may also change. The Berne Convention retained in Paris the guiding phrase 'the country which having regard to its economic situation and its social or cultural needs, does not consider itself immediately in a position to make provision of all the rights' laid down in the Convention. The U.C.C. conference did not feel that these guiding works added anything to the basic criterion and did not adopt them.

²² Appendix Article III (5) Berne Convention op.cit.

²³ The Delegate of Cuba at the Conference expressed his government's views that the intellectual worker exercised a pre-eminent social function and that no economic barriers of access to works of the mind should exist.

²⁴ Inaugural address made on the 5th July, 1971, at the opening of the conference for the Revision of the Universal Copyright Convention.

HOW A DEVELOPING COUNTRY BECOMES ENTITLED

What must a developing country do to entitle it to obtain the facilities laid down in the Conventions? The country must, first of all, become a party thereto. The new Universal Copyright Convention comes into effect three months after 12 states have deposited their instrument of ratification, acceptance or accession²⁵ and any state not signing the Convention may become a party thereto and it shall come into effect three months after that state has deposited its instruments of accession.

The Paris Act of the Berne Convention allows a Country of the Union to accede to it in part by declaring, as has been stated earlier, that Article 1 to 21 and the Appendix, protecting certain fundamental rights, do not apply to the acceding country.²⁶ In Malta, as our national legislation is not completely in consonance with all the Articles of the Brussels Convention which have now again been reproduced in the Paris Act, we can avail ourselves of this unique opportunity by adhering, at least in part, to the latest convention approved in Paris in July 1971 while remaining bound by the earlier Act signed in Rome in 1928, as Article 7 still fixes the term of protection to the life of the Author and 50 Years after his Death. It is only if Articles 1 to 21 of the Paris Convention have come into force in a country may it not accede to earlier Acts of the Convention.²⁷

SPECIAL PROCEDURE

A developing country on becoming a member of the Convention²⁸ if it desires to avail itself of the special facilities of translation and reproduction of works provided for by the Conventions must at the time of ratification or accession deposit with the Director General of W.I.P.O. or U.N.E.S.C.O. as the case may be, a declaration of intent to take advantage of these special rights which shall be effective for a period of ten years from the entry into force of the convention. These periods may be renewed at ten year intervals until the member state ceases to be regarded as a 'developing country'.

The Paris Acts also lay down a special initial procedure that

²⁵ Article VII and IX. (U.C.C.) *op.cit.*

²⁶ Article 28 Berne Convention *op.cit.*

²⁷ Article 34 *idem.*

²⁸ Vide (i) Article V Bis (1) U.C.C. and (ii) Article I of the Appendix, Berne Convention *op.cit.*

must be followed before a licence can be obtained. Whether in the case of translation or the reproduction of a work the prospective licensee must make special efforts to negotiate a licence or to find the owner of the right. Either of these facts must be established. Therefore, when the *owner is known*, the person seeking the licence must send him a request to make and publish the translation or to reproduce and publish the edition whether the applicant is successful in negotiating a permission or whether this has been denied to him by the owner. At the time he makes the request the applicant shall also inform any national, regional or international information centre which may have been designated by the government of the state in which the publisher is believed to have his principal place of business. Under the U.C.C. Paris Act, information may instead be given to the *International Copyright Information Centre*, which was set up by U.N.E.S.C.O. purposely to help easing problems facing publishers in developing countries. Throughout the world, 5,000 million copies are published yearly but Asia accounts for only 2.5% while Africa produces 0.15%. There is still a big shortage of domestically produced books in such places as the Arab States and Latin American countries.

When the owner of the right to translate or reproduce a *work cannot be found*, the applicant for a compulsory licence, is required to send to the publisher whose name appears on the work a copy of the application. Similarly a copy shall be sent by registered airmail to a national or international centre. Again under the U.C.C. Paris Act, information may instead be given to the *International Copyright Information Centre*. This latter convention also requires that if the nationality of the owner of the translation right is known²⁹ another copy must be sent 'to the diplomatic or consular representative of the State of which such owner is a national'. Under the Berne Act it appears from the General Report of the Conference that it is enough that the authority granting the compulsory licence should have taken reasonable steps to ensure that the owner of the right of translation or reproduction has had an opportunity to be aware of the application and to take such measures as may seem to him appropriate.³⁰

When the owner of the right of translation or reproduction cannot be found, the applicant for a compulsory licence must show that he

²⁹ Article V (1) (c) U.C.C. op.cit.

³⁰ Vide Report U.C.C. 1971 Para. 39. op.cit.

has, in fact, exercised due diligence to trace him. The delegation of India at the conference had proposed an amendment stating that an effort in good faith to comply with the requirements of the convention was enough.³¹ The proposal was not, however, accepted by the delegates at the conference as it was rightly considered that a matter whether a licence was rightly granted by the authorities of a country was the responsibility of the courts in the country to be decided in each case.

CONDITIONS FOR A LICENCE

Finally, the Paris Acts lay down a few conditions to the licence holder availing himself of the facilities of translation or reproduction of the works, namely,

- (i) the original title and the name of the author of the work must be printed on all copies of the translation or the reproduction and
- (ii) the copies may not be reproduced outside the territory of the country granting the licence.

These two conditions also set up a number of problems to the developing countries and a joint Working Group of the Main Committee of the Universal Copyright Convention and the Berne Convention have recommended that an interpretation of the problems be included in the Reports of the two Conferences. The Delegates at the conventions have accepted that although the compulsory licence holder was to reproduce the work in his own country he could employ a translator in another country and also reproduce the work abroad if no reproduction facilities exist in his country and for economic or practical reasons it cannot be reproduced there.³²

CONCLUSION

During the twenty years that have gone by since the passing of the Universal Copyright Convention by the United Nations at Geneva in 1952, problems of translation and reproduction rights had faced newly independent nations. Therefore, while the Paris Acts have attempted to provide a solution they have also protected the copyright owner by providing that a just compensation be paid to him and by placing a ban on the export of books thus translated or reproduced. The criteria for assessing the fair compensation is

³¹ Vide Report U.C.C. 1971 Para. 101. *op.cit.*

³² Vide Report U.C.C. 1971 Para. 115 *op.cit.*

also laid down. It must be such as 'is consistent with the standards of royalties normally operating or licences freely negotiated in the two countries'.³³ Moreover, the compensation should be paid in international convertible currency and the national authorities should not restrict the transfer of payment by currency regulations.

Again, the rights of the Author are protected by a ban on export of the works translated or reproduced. The only exception that the Paris Acts make on the prohibition of the export trade is if this is done by a governmental or other public entity and if the work is a translation into a language other than English, French or Spanish. The persons benefitting from such works as recipients must be individuals or organizations of the State granting the licence and the copies are to be used only for the purpose of teaching, scholarship or research. The authority may charge a price for the copies but this is to cover only costs of production without allowing for any financial gain.

The Paris Conferences of 1971 have no doubt provided a basis for future international collaboration in the field of copyright. Nations wealthy in literary and artistic material may make the less fortunate partakers of their resources. The two conventions make an important contribution towards achieving one of U.N.E.S.C.O.'s fundamental aims: the right to culture.³⁴ They tend to reconcile the right to the protection of the moral and material rights of the author with the right of everyone to participate freely in the cultural life of the community.

³³ Appendix Article IV (6) a. Berne Convention and Art. V/ter (5) (U.C.C.) op.cit.

³⁴ Article 27 of the Universal Declaration of Human Rights.

~~NOTARIAL REMINISCENCES OF LAST WILLS~~

~~PAUL PULLICINO~~

~~THE right to own property imposes upon a person the moral obligation of protecting that property even after he has ceased to live and by making a Will he can ensure that his estate is to devolve on the person or persons of his choice.~~